No. 80-581

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

*Appellants,*

*vs.*

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, AND DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

*Appellees.*

**On Appeal from the Supreme Court of the State of Montana**

## BRIEF AMICUS CURIAE OF THE STATE OF NEW JERSEY IN SUPPORT OF JURISDICTIONAL STATEMENT

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**On Appeal from the Supreme Court of the State of Montana**

## BRIEF AMICUS CURIAE OF THE STATE OF NEW JERSEY IN SUPPORT OF JURISDICTIONAL STATEMENT

## Interest of the State of New Jersey

New Jersey is an energy consuming state. In the past, its electric utilities have derived a substantial portion of their power from oil. However, most recently, New Jer- has been forced by rising costs and Federal energy policy to look to coal as the generation source of electric power. A combination of economics and Federal energy policy are expected to continue to induce a substantial rise in the use of coal by New Jersey and other Northeastern States.

New Jersey utilities have historically not used coal from Montana and the Rocky Mountain area since rail transportation has always added a prohibitive cost factor to its use in the Northeast. New Jersey coal sources are West Virginia, Virginia and Pennsylvania, with a smaller amount coming from Kentucky and Georgia. In 1979, New Jersey utilities purchased over two million tons of coal.* New Jersey has also been increasing its consumption of power generated by coal. The most recent figures indicate that New Jersey electric utilities burned 300,000 more tons of coal in the period of January through August 1980 than they did through the same period of 1979. New Jersey expects that the coal consumption will steadily increase throughout the contemplated future.

Presently those states which supply the coal needs of New Jersey and the bulk of the Northeast have relatively low severance taxes on the production of this energy source. However, New Jersey fears that if this excessive Montana tax is allowed to stand, the Eastern coal-producing states will, in turn, raise their severance taxes to collect a simi-

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* This figure excludes any electric power (generated by coal) which was purchased by New Jersey utilities from utilities located in other states.

lar amount from what is admittedly a vast source of revenue.* This will result in the unfettered interests of the energy producing states being pitted against those of the energy consuming states.

As a consumer state, New Jersey has an interest in seeing that an energy-rich state is not permitted to override national objectives for its own financial gain. Any constitutional rule which permits such assault by one state or group of states upon others surely frustrates national energy policy as well as striking at the heart of the policies underlying the Commerce Clause.

## The Questions Presented are Substantial

The State of New Jersey subscribes to the arguments set forth in appellants' Jurisdictional Statement, and shall not burden the Court by repeating them at length. However, New Jersey wishes to add some comments herein.

The Supreme Court of Montana has, in its affirmance of the Montana coal severance tax, held that the "trend" of the law lies in the direction of allowing a state to tax local products which eventually flow in interstate commerce once some nexus with that state has been established. This was held to be so regardless of how burdensome that tax is upon interstate commerce. The Court below did not consider factually the question of the fair relation of the revenues generated by the tax to the services alleged to be provided by the state, one of the four standards articulated by this Court to measure the validity of state regulation of interstate commerce. *Department of*

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* Montana will receive an estimated $1.5 billion in coal severance tax revenues during 1979-85 period. This is 6.4 times greater annual coal revenues than its estimated 1978 coal revenues of $33.6 million.

*Revenue* v. *Assn. of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977).

In support of its position, the Court below relied strongly on a series of cases which are over fifty years old, and which were decided when natural resources first began to move substantially in interstate commerce, *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245 (1922); *Oliver Iron Co.* v. *Lord,* 262 U.S. 172 (1923). Appellants have argued that a tax "tailored" to fall principally upon non-residents substantially affects interstate commerce, and therefore should be measured against the four-pronged test articulated in *Complete Auto Transit.* The contention should be given due consideration and not brushed aside lightly. Montana's excessive coal tax, levied at a rate in gross disproportion to the fair needs of the taxing state, seriously affects those consuming states which depend on western coal; it may also be a dire portent of future divisions between energy-rich and energy-poor states. Therefore, such taxes should be declared in violation of the Commerce Clause in appropriate circumstances.

The Supreme Court of Montana also rejected, as a matter of law, appellants' contentions that this tax frustrates national energy policy and is therefore preempted under the Supremacy Clause. The Court below justified its decision by holding that it could not discern any national policy favoring the use of coal with which the tax conflicts or which is substantially frustrated by the tax. New Jersey submits that Congressional intent has been expressed in the scheme of legislation confirming and promoting a policy of the maximum use of domestic resources including coal. When it is weighed against the oppressive nature of a tax which discourages the use of this

natural resource, then the tax must be voided. The state legislation stands as an obstacle to the accomplishment of Congress because the practical effect of the tax is to impede the implementation of federal policy. *Perez* v. *Campbell,* 402 U.S. 637 (1971). *See also Jones* v. *Rath Packing Co.,* 430 U.S. 519, 540-43 (1977). Therefore, Montana's view that preemption exists only where a state law specifically and directly conflicts with a federal statutory provision is unduly narrow.

## CONCLUSION

**The Jurisdictional Statement filed in this cause discusses substantial federal questions presented in the construction of the Montana coal severance tax. Those questions include interpretations of the Commerce Clause, the supremacy of federal law, and the role of competing state interests within our federal system. Resolution of those questions is important to states who consume energy sources. Therefore, this Court should note probable jurisdiction to review the opinion and judgment of the court below.**

Respectfully submitted,

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Dated: November 12, 1980.